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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 234

THE UNITED STATES OF AMERICA, EX REL., CHICAGO GREAT WESTERN RAILROAD COMPANY, AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,
Respondents.

REPLY BRIEF FOR PETITIONERS.

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REPLY BRIEF FOR PETITIONERS.

MAY IT PLEASE THE COURT:

In the briefs filed herein, all respondents take the position that the Commission exercised a jurisdiction which makes its action impregnable to mandamus. In addition, the brief of the Kansas City Terminal Railway Company (hereinafter called the Terminal Company) argues that the Commission did not have the power which it is said to have exercised, thus taking both sides of the same question. We wish to submit a brief reply to the arguments presented.

The question of whether or not the Commission denied its power.

The Commission argues in its brief (pp. 28 *et seq.*) that mandamus is not available to control the judgment and discretion of the Commission. We wish to make it plain that petitioners do not contend that the manner in which the Commission should exercise its power and discretion can be controlled by mandamus. Our only claim is that a wrongful denial of power by the Commission; a refusal by it to exercise a power and jurisdiction conferred upon it by statute, is subject to mandamus, and that in this case there was such a wrongful denial of power and refusal to act.

The argument made seems to reduce to two points which are somewhat contradictory of each other. One is that the Commission, by sustaining a challenge of its power to act, exercised a judgment and discretion which cannot be controlled by mandamus. The second is that the action of the Commission was not a negative determination of its power, but an administrative determination that petitioners' legal position was such that no relief could be given them.

The answer to the first point made is obvious, for certainly a court or commission does not exercise jurisdiction and power by declining to do so. In the *Humboldt Steamship Company Case,* 224 U. S. 474, it was urged that the Commission's action, being an alleged error of law, could not be corrected by mandamus. But the claim was overruled, this Court saying at page 484:

> "But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion."

In *Miguel* v. *McCarl,* 291 U. S. 442, this Court said (p. 452), citing *Roberts* v. *United States,* 176 U. S. 221, that the act of an officer of government may be ministerial even though it depends upon a statute which requires some con-

struction by the officer. We submit that in this case the taking of jurisdiction by the Commission for the purpose of holding that it did not have the power and authority claimed for it was not an action impregnable to mandamus.

On the second point made, the language used by the Commission in its report and quoted in our main brief demonstrates that it was passing on the question of its own power and authority and not upon the legal status of petitioners. No respondent has claimed the contrary; in fact, those statements of the Commission are not discussed. That the Commission did deny its power and authority is the only conclusion to be drawn from its statements that the motion to dismiss petitioners' petitions was a challenge of its power (R. 92); that the question for decision was whether or not the claimed power had been conferred upon it (R. 94); that the claimed power and authority had not been conferred by Section 3 (4) (R. 95) or by any other provision of the Act. (R. 96.) In the *Louisville Cement Company Case,* 246 U. S. 638, statements by the Commission that it was "without power to grant the relief prayed for" and that it was "without jurisdiction," were held (pp. 641, 642) to demonstrate a denial of power and authority. The Commission used the same phrases in its report in the case at bar.

This circumstance distinguishes the case at bar from *B. A. & P. Ry. Co.* v. *United States,* 290 U. S. 127, *Interstate Commerce Commission* v. *United States,* 289 U. S. 385, and *Interstate Commerce Commission* v. *N. Y., N. H. & H. R. Co.,* 287 U. S. 178, cited by respondents. In the *B. A. & P. Ry. Co. Case,* 290 U. S. 127, there was no question of the Commission's power to deal with the matter presented to it. The construction to be placed upon the word "deficit" was as much a part of the merits of the claimant's case as any other essential fact that it was required to prove, and the Commission exercised the authority conferred upon it

by law when it determined that construction. In *Interstate Commerce Commission* v. *United States, ex rel. Campbell,* 289 U. S. 385, the Commission held that the proof submitted to it was insufficient to justify an award of reparation; obviously an exercise of power and authority. In the *N. Y., N. H. & H. Ry. Co. Case,* 287 U. S. 178, the value claimed by the railroad had been included in the valuation of its properties by the Commission, and the issue was the propriety of the method followed in stating the value.

Thus, in all these cases the Commission had actually exercised power within the limits of its jurisdiction. The only question presented was whether it had acted properly, and in accordance with its previous decisions, this court held that it would not undertake to control the judgment and discretion of the Commission. In *General Investment Co.* v. *N. Y. C. R. Co.* 271 U. S. 228, also cited by respondents, this court held (p. 230) that whether a plaintiff seeking relief has the requisite standing is a question going to the merits, but the case has no application here. As appears from the report of the Commission, its action was not based on the lack of standing on the part of petitioners, but on the alleged lack of power on the part of the Commission itself.

The argument that the Commission exercised jurisdiction is based upon respondents' complete failure to give any consideration to the issue presented to the Commission by the motion to dismiss petitioners' petitions or to the language used by the Commission in deciding that issue. As we pointed out in our main brief (p. 21), even the language used by the Commission in dealing with paragraphs (1) and (3) of Section 3 of the Act (R. 96) is a disclaimer of power, rather than an exercise of it.

There is a further answer to respondents' argument that the Commission did exercise a power and authority within the jurisdiction conferred upon it by statute. As we said

in our main brief (pp. 50, 51), the Commission apparently considered petitioners' intervening petitions as applications by petitioners for a revision or reformation of the operating agreement. This was in error, for the issue actually presented to the Commission was one of prejudice and discrimination alleged to be in violation of law. If the Commission, in doing what it did, was passing upon its right to revise the operating agreement, its action cannot protect it against the issuance of the writ prayed for herein. In such case, its conclusions dealt with an issue not before it for consideration and did not constitute an adjudication of any of the merits of the claims presented by petitioners.

This is so, no matter what the Commission said or did on the issue of its power to revise or reform the operating agreement and regardless of what its power may have been to deal with that issue. An exercise of power by the Commission sufficient to defeat mandamus must be the exercise of a power committed to it by law. It may not consist of the expression of opinion on a matter not committed to it by law and hence beyond its power, or on a matter not before it for decision. In *United States* v. *Interstate Commerce Commission*, 252 U. S. 178, the Commission declined to ascertain certain facts required by the Valuation Act, for the reason, as stated by it, that such ascertainment was beyond the possibility of rational determination and called for inadmissible assumptions and impossible hypotheses. Under respondents' theory, that action amounted to the exercise of jurisdiction, judgment and discretion. This court, however, held that mandamus would lie to compel action by the Commission, saying (p. 188) that the Commission's action was "an unwitting assumption of authority by the Commission which it did not possess."

Thus, no matter what view is taken of what the Commission did, the writ prayed for should issue. Had the Com-

mission taken jurisdiction of the issues actually presented to it, it would have been required upon the conclusion of testimony, to find the facts determining the existence or non-existence of the prejudice and discrimination which was claimed to exist and then announce its conclusion upon those facts. Certainly, it did not do this, nor do we understand that respondents claim it did. If, then, it declined to act on the charge of unlawful discrimination and prejudice presented to it, and on which it certainly had power to act, its action was clearly wrong and the writ should issue.

On the other hand, even if it actually exercised its power and discretion, as asserted by respondents, it would seem that the power was exercised in considering the question of whether there should be a revision of the operating agreement. Since this question was not submitted to it for consideration, its determination thereof, whether on the merits or otherwise, does not give it immunity from mandamus to compel it to exercise its undoubted jurisdiction and power with respect to the issue which was submitted to it.

The Question of the Commission's Power.

Respondents differ among themselves on the question of whether the Commission actually had the power and authority claimed for it by petitioners. The contention of the Commission seems to be that it not only exercised its power in dismissing petitioners' petitions, but actually had the power which it exercised. On the other hand, the Terminal Company, while agreeing that the Commission exercised power to the extent that its action is not subject to correction through mandamus, further asserts that this exercise of power was gratuitous on the part of the Commission, and devotes many pages of brief to the proposition that the Commission had no power to do that which the Terminal Company says it did. The other intervening

railroad respondents have filed a brief concurring in the various arguments presented by the Terminal Company.

The position of the railroad respondents with respect to paragraphs (1) and (3) of Section 3 of the Interstate Commerce Act is predicated upon a word by word analysis of the language of those paragraphs, it being claimed that they contain no language conferring upon the Commission jurisdiction over such relations between railroad companies as those existing at Kansas City. It is further claimed that any doubts as to that jurisdiction would have to be resolved against its existence because it would confer upon the Commission power to revise the operating agreement.

In order to reach these conclusion, the railroad respondents have been compelled to take a much narrower view of the prohibitions against discrimination and prejudice contained in paragraphs (1) and (3) of Section 3 than this court has ever taken, and have also been compelled to disregard certain language of the paragraphs themselves. It is said that paragraph (1) deals only with discrimination and prejudice against shippers, this conclusion being supported by citations from a few decisions of courts and the Commission. These decisions do not, we submit, support the conclusion reached.

In *Texas & Pacific Railway Company* v. *United States,* 289 U. S. 627, this court held that the purpose of Sections 2, 3 and 4 of the Act was to prevent unjust discrimination resulting from existing practices, the Act having been passed for the protection of those who pay or bear the rates. Since petitioners do pay and bear the charges of which they complain in the case at bar, they claim no meaning in the Act which this court has not upheld.

In *Oregon Short-Line Railway Company* v. *Northern Pacific Railroad Company,* 61 Fed. 158, it was held that the complaining railroad could not appropriate the grievance of a traffic or locality and complain on account of it. Peti-

tioners are not doing this, as the claimed discrimination and prejudice operates only to their disadvantage. Their case is not based upon an injury to anyone else.

In the *Southwestern Bell Telephone Company Case,* 183 I. C. C. 771, and in *Discontinuance of Inland Stations in New York City,* 173 I. C. C. 727, the Commission did hold that the discrimination and prejudice prohibited by Section 3 (1) was a prejudice of and discrimination against shippers, but this conclusion was based upon what was said to be the legislative history of the paragraph. That legislative history, as quoted in the brief of the Terminal Company (pp. 28, 29), is no more than a statement of the language of the paragraph, which remits us to the language of the paragraph to discover its meaning. Moreover, in the *Southwestern Bell Telephone Case* the Commission did hold that Section 3 (3) specifically prohibited discrimination between carriers, but the railroad respondents deny this, although seeking the advantage of the Commission's holding with respect to the meaning of Section 3 (1).

The argument of the railroad respondents as to the character and kind of prejudice and discrimination prohibited by paragraphs (1) and (3) of Section 3 disregards every decision of this court announcing the effect of the paragraphs as related to the general purposes of the Interstate Commerce Act. As long ago as 1914, this court, in *H. E. & W. T. R. Co.* v. *United States,* 234 U. S. 342, considered the language now contained in Section 3 (1) of the Act. In that case the Commission had required the removal of discrimination against interstate commerce, its action being taken under Section 3 (now Section 3 (1)) of the Act. Dealing with the claim that authority to make the order had not been conferred upon the Commission by Congress, this court quoted the language of the law and said at page 356:

"This language is certainly sweeping enough to em-

brace all the discriminations of the sort described which it was within the power of Congress to condemn. There is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by the relation of intrastate to interstate rates as maintained by the carrier. It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach."

This announcement of the purposes of the law has been consistently approved by this court in all subsequent decisions on the same subject (pp 28 *et seq.* our main brief), but these decisions are ignored by respondents or are sought to be distinguished on immaterial grounds. We submit that the application of the law can not be limited as respondents seek to limit it. To so limit it would deprive the Commission of a major weapon in combating the evils at which the law was aimed and would severely cripple it in attempting to carry out the purposes of Congress.

The argument of the railroad respondents necessarily implies a lack of power in the Commission to deal with the Kansas City terminal, no matter what the facts are. Thus, those facts might show the existence of an undue and unjust prejudice of and discrimination against petitioners. It might appear, as petitioners claim it does, that the payments made by them because of their use of the facilities of the Terminal Company are so burdensome as to probably cause their bankruptcy; that such payments only benefit other roads, and that petitioners receive nothing for them; that such payments are so large in amount as to limit or destroy petitioner's ability to perform well their interstate functions. Nevertheless, the argument of the railroad respondents would compel the conclusion that the

Commission has no power or authority under the law to correct the situation. We submit that this is not so.

This court has held that the "preservation of the earning capacity and conservation of the financial resources of individual carriers is a matter of national concern" (*T. & P. R. Co.* v. *Gulf, etc. R. Co.*, 270 U. S. 266, 277); that prejudice to interstate commerce may result from "excessive expenditures in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce" (*Colorado* v. *United States*, 271 U. S. 153, 163); that the purpose of Congress was "to prevent interstate carriers from incurring expenses which will lessen their ability to perform well their interstate functions" (*Commission* v. *S. P. R. Co.*, 264 U. S. 331, 347). And the statute itself contains "a specific prohibition of preferences and discriminations in all ways that they can be executed, with corresponding regulatory power in the Commission." (*Smith* v. *I. C. C.*, 245 U. S. 33, 43.)

These holdings cannot be reconciled with a construction of the law which would permit at Kansas City the continuance of a prejudice and discrimination which can be shown to be so pronounced as to constitute a severe drain upon the resources of petitioners; so severe, indeed, that it may well lessen their ability to perform well their interstate functions. Paragraphs (1) and (3) of Section 3 contain apt words upon which the power of the Commission to act in this case may be properly based. In so acting, it would exercise no power which it has not exercised many times in the past.

Many cases are cited by the Terminal Company on the proposition that the distribution of the tax and interest charges of the Terminal Company among its owning lines is a matter of corporate relationship with which the Commission can have nothing to do. The Terminal Company

has designated these charges at page 31 of its brief as "payments on account of a vested proprietary right in physical facilities and their use." But nowhere in the brief is it said that petitioners receive anything for the money paid by them to the Terminal Company or on its account, other than the use of its facilities to the extent that those facilities are used. It must be conceded, as it apparently is, that this is the only benefit received by any proprietary line of the Terminal Company for the payments made by it. The operating agreement itself so provides.

There is in this case, therefore, no question of the intercorporate relationships of railroad companies, aside from those relationships necessarily resulting from the obligation of petitioners and the other proprietary lines to perform their duties as common carriers in interstate commerce. The distribution of the capital stock of the Terminal Company among its proprietary lines has nothing whatever to do with this relationship. There being nothing here involved but the payments made by petitioners for a right of user essential to the discharge of their duties as common carriers in interstate commerce, it would seem to follow that the Commission has power to prohibit any prejudice or discrimination in those payments.

Much is also said in the brief of the Terminal Company with respect to the facts in connection with the acquisition of its present property, and there is considerable speculation as to what would have been the rights of the various trunk lines had something else been done. Such discussion is profitless. The essential facts are that the Terminal Company was formed and its properties acquired or constructed for the sole purpose of furnishing terminal facilities for all the railroads serving Kansas City; that those facilities are now used by those railroads,

including petitioners, in the discharge of their duties as common carriers in interstate commerce; that this use is all they get for the money expended by them; and that their ownership of some percentage of the stock of the Terminal Company means nothing, either with respect to the right of user or with respect to the obligation to pay.

We submit that these circumstances fix a jurisdiction in the Commission which cannot be affected by the designation of certain of those charges as "capital expenditures" or by assuming that had some other plan been followed, the rights and obligations of the various railroads would have been different. The argument of respondents on this point, as stated by Commissioner Eastman (R. 116), confuses the status of the railroad companies as stockholders of the Terminal Company with their status as users of its terminal facilities.

The major argument presented by the railroad respondents is predicated upon the assumption that the Commission was called upon by petitioners to modify or annul the present operating agreement. This proposition is repeatedly stated in the brief of the Terminal Company in various forms. At page 23 it is said that the Commission was asked to set aside a contract. At page 39 it is said that there is no authority in paragraphs (1) and (3) of Section 3 for the annihilation of the operating agreement. At page 42, reference is made to the power of the Commission to set aside contracts already made. At page 45, it is said that if Congress had intended to destroy solemn contracts without compensation it would have made that intention plain. At page 49, it is said that petitioners want a revision of the operating agreement.

Starting from this assumption, it is argued that the law does not specifically confer upon the Commission power to set aside the operating agreement, and that this power

is so far reaching that it may not be inferred; that consequently the power does exist and that the Commission's denial of that power was proper and must be sustained. This entire argument is based upon the false premise that petitioners asked the Commission to deal with the operating agreement. Such is not the case, although the Commission apparently had that idea. (R. 95, 96.) The Court of Appeals also seems to have the same idea. (R. 208.) This mistaken view of the Court of Appeals may may have been responsible for the conclusion stated by it with respect to the Commission's power. (R. 208.)

As we said in our original brief (p. 51), we may concede a lack of power in the Commission to modify or annul the operating agreement, but this lack of power in the Commission implies no lack of power to deal with an unlawful discrimination and prejudice resulting from the operation of the agreement. In dealing with that discrimination and prejudice, the Commission would give no consideration to the agreement at all, as its power to deal with such a violation of the law is not affected by the existence of the agreement. The Commission has itself adopted this view in other cases.

In *Long Island Railroad Company Trackage*, 162 I. C. C. 218, it was claimed that the Commission did not have jurisdiction of the compensation to be paid for the trackage there in issue. Without undertaking to pass upon the validity of the state statute which it was claimed reserved jurisdiction to the New York Transit Commission, the Commission said at page 221:

> "The power conferred upon us by the Act is in the interest of protecting interstate commerce. The carriers here involved being engaged in interstate commerce, our jurisdiction is plenary."

On the further hearing in the same case (180 I. C. C.

439), the same question of jurisdiction was raised, but the Commission only said, at page 446, with respect to this contention:

> "It is unnecessary to repeat what was stated in our prior report with respect to our jurisdiction."

The order it finally made in the proceeding was sustained by this court in *Transit Commission* v. *United States,* 289 U. S. 121.

In *Long Island Railroad Company Abandonment,* 162 I. C. C. 363, the jurisdiction of the Commission was challenged on the ground that it constituted an invasion of the state sovereignty, since the Transit Commission of New York had ordered the removal of grade crossings on the line proposed to be abandoned, which crossings could only have been removed through expenditures so great as to be regarded by the Commission as wasteful and therefore a burden on interstate commerce. Both in the first hearing and in a subsequent hearing at 166 I. C. C. 671, the Commission declined to pass upon the constitutional questions thus raised, only saying (162 I. C. C. 363, 374) that it was of opinion that it had the requisite jurisdiction and power. Its order in the case was sustained by this court in *Transit Commission* v. *United States,* 284 U. S. 360.

The same conduct by the Commission has been specifically approved by this court in other cases. In *Claiborne-Annapolis Ferry Co.* v. *United States,* 285 U. S. 382, it was argued that the order of the Commission there attacked was void for the reason that the applicant did not have corporate power to operate the ferry which was the subject of the application. This court said at page 391, that this question of corporate power was one which could not be considered since Congress never intended to impose upon the Commission the duty of determining matters of

that nature before granting or withholding assent to the construction of an extension.

In *New York Central Securities Corporation* v. *United States,* 287 U. S. 12, the order of the Commission was challenged upon the ground, among others, that the proposed leases were *ultra vires* and in conflict with certain Ohio statutes. This court held (pp. 26, 27) that the Commission was not required to consider these questions, saying that there was no warrant for concluding that Congress intended to fetter the exercise of the Commission's authority by requiring that it determine such matters before making an order, and that the question of corporate powers could not properly be raised in the suit to set aside the Commission's order.

In *Cleveland, etc. R. Co.* v. *United States,* 275 U. S. 404, the Commission had made an order requiring the Railroad Company to make switch connections with the tracks of a coal company, the authority of the Commission being limited to the construction of such connections with private side tracks. The order was challenged on the ground that a state statute, which had been upheld by the state Supreme Court, declared the tracks of the coal company to be public tracks. The Commission, however, made its order without passing upon the validity of the state statute, and its order was affirmed by this court on a holding that the state court judgment could not affect the Commission's jurisdiction.

In *Missouri Pacific R. Co.* v. *United States,* 4 Fed. Supp. 449, it was claimed that the order of the Commission authorizing the Southern Pacific Company to acquire control of the St. Louis Southwestern Railway Company was void upon the ground, among others, that it had the effect of annulling and abrogating an agreement known as the Gould-Huntington Agreement. The Commission had

declined to pass upon the validity of the agreement, saying (180 I. C. C. 175, 203) that its order must be based upon the public interest; that it was not within its province to construe the agreement or adjudicate the rights of the parties thereunder; that the question was whether the acquisition of control sought was in the public interest and that the status of the parties under the agreement should rest with the courts. The existence of the agreement was again urged upon the District Court as a ground for setting aside the Commission's order; but that court, in denying the claim, said (p. 456):

> "Even if it were conceded that the Texas & Pacific had rights under the Gould-Huntington agreement which the acquisition of control of the Cotton Belt by the Southern Pacific might result in the violation thereof, the commission had power to make the orders complained of upon its determination that the public interest called for such acquisition. *Louisville & N. R. Co.* v. *Mottley*, 219 U. S. 467; *Kansas City Southern R. Co.* v. *United States*, 231 U. S. 423; *New York* v. *United States*, 257 U. S. 591."

The decision of the District Court in this case was affirmed by this court in a *per curiam* opinion on October 22, 1934, ___ U. S. ___.

Petitioners only desire the Commission to take the same action in the case at bar as it took in the foregoing cases; that is to say, we desire it to pass upon the question of the alleged discrimination and prejudice. If the claimed violation of law is found to exist, the Commission should enter an order prescribing what is to be done, without regard to the operating agreement. The question of what would then happen under the agreement, as between the proprietary lines, could be left to the courts, if necessary, just as the Commission said should be done in *St. Louis Southwestern Ry. Co. Control*, 180 I. C. C. 175, 203. The Terminal Company has indicated some questions which might arise (pp. 58, 59, its brief), but it is not necessary for

the Commission to consider these matters, nor are the possibilities suggested by counsel important in this case. The power of the Commission to cure an existing law violation cannot be limited by such considerations.

Under the foregoing decisions and the cases cited in our original brief (pp. 48, *et seq.*), the Commission surely has power to make an order prohibiting unlawful prejudice and discrimination, even though it may result from the operation of a contract. That power was first established by this court in the *Mottley Case,* 219 U. S. 467, 482, and has been repeatedly followed. In *Sutter Butte Canal Co.* v. *Commission,* 279 U. S. 125, this court, in speaking of the *Mottley Case, supra,* said, at page 138:

> "In that case it was held that the power of Congress to regulate commerce among the states, which is analogous to the police power of the states in regulating public utilities, extended to rendering impossible enforcement of contracts made between carriers and shippers, although valid when made, because they were all made subject to the possibility that even if valid when made, Congress might, by exercising its power, render them invalid."

One of the most recent expressions of this court on this subject is in *Nebbia* v. *New York,* 291 U. S. 502, where this court said at page 523:

> "Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."

Since petitioners' attack before the Commission was not upon the operating agreement but upon a claimed discrimi-

nation and prejudice violative of the act, the argument of respondents on this point necessarily falls. This court is not called upon, as respondents say, to invest the Commission with a new far-reaching power to modify or annul contracts, but is only asked to require the Commission to exercise its power to hear and determine a case involving a discrimination and prejudice alleged to be in violation of the law.

The decisions of this court in *Interstate Commerce Commission* v. *Los Angeles,* 280 U. S. 52, *Interstate Commerce Commission* v. *Oregon-Washington Railroad & Navigation Co.,* 288 U. S. 14, and *Texas* v. *Eastern Texas R. R. Co.,* 258 U. S. 204, cited by respondents, have no application to the case at bar. In the *Los Angeles Case,* the Commission was said to have power to require the building of a gigantic union station costing many millions of dollars. In the *Oregon-Washington Railroad & Navigation Co. Case,* the Commission had claimed power to require the building of a railroad at large cost into a territory which the defendant company had not undertaken to serve, and which railroad could only have been operated at a loss. In the *Texas Case,* it was sought to invest the Commission with power to deal with intrastate commerce, independently of its effect on interstate and foreign commerce. These were powers of the broadest type; were new in every sense of the word, and the claim that they existed was not founded upon any language of the Interstate Commerce Act. On the other hand, the power of the Commission to deal with discrimination and prejudice must surely be conceded by now. That power was recognized in the cases cited by respondents. As was said in the *Los Angeles Case,* 280 U. S. 52, at page 62, the Commission, while denying its jurisdiction, was careful

to point out that no question of discrimination or preference had been presented to it.

We submit that under the foregoing it should be held that the language of paragraphs (1) and (3) of the Interstate Commerce Act is sufficiently broad to confer upon the Commission power to deal with and correct such prejudice and discrimination as is alleged by petitioners to exist at Kansas City; and that neither the existence of the operating agreement nor the ownership of stock of the Terminal Company by petitioners can be given the effect of depriving the Commission of that jurisdiction, a jurisdiction which it must be held to have if the purposes of Congress, as repeatedly announced by this court, are to be fulfilled.

With respect to paragraph (4) of Section 3 of the act, all respondents present the same argument. This argument reduces to the claim that petitioners are not such carriers as may take advantage of the paragraph, for the reason that the operating agreement now gives them the right to use the facilities of the Terminal Company upon payment of the amounts prescribed by that agreement. On this point we can add nothing to what was said in our main brief (pp. 33, *et seq.*).

We submit that the error of respondents lies in their assumption that the compulsion which they insist is necessary, must exist with respect to physical use only and not with respect to the compensation to be paid for that use. It seems to us that the required compulsion may exist either with respect to the physical use or with respect to the compensation to be paid for such use, since it is obvious that both must be dealt with to make effective any exercise of power by the Commission under paragraph (4).

If it be conceded that the right to use and the com-

pensation to be paid for such use are of equal importance under paragraph (4), as they certainly are, it seems plain that the jurisdiction of the Commission should exist to determine either issue independently of the other. Respondents' argument compels the conclusion that if petitioners declined to pay the charges required by the Kansas City operating agreement, and were by reason thereof barred from the use of the facilities of the Terminal Company, their right to reacquire that use under Section 3 (4), upon the payment of compensation to be fixed by the Commission, would be admitted. We cannot follow a construction of the law which denies a jurisdiction under that paragraph merely because petitioners have failed to violate the terms of the agreement.

The question of public interest.

We refer to this subject because of the relative importance given it in respondents' brief. The Terminal Company takes the position in its brief (pp. 64, *et seq.*) that the holders of the bonds of the Terminal Company are such parties in interest that they were entitled to be heard in the proceedings before the Commission; that any order of the Commission which might reduce the payments of petitioners on account of interest and tax charges of the Terminal Company, in order to remove an unlawful discrimination and prejudice, would deprive those bondholders of their rights contrary to law.

The brief of the Commission suggests (p. 43) that some bonds of the Terminal Company were sold after the Commission made its report and order of November 10, 1925; that these bonds were probably purchased by the public upon the faith of the Commission's decision; and that the purchasers of those bonds would, therefore, be prejudiced in the event of any decision in the case at bar which might result in granting to petitioners any reduction in the charges now paid by them.

We concede that the holders of the bonds of the Terminal Company are entitled to the benefit of every clause of the indenture securing their bonds, but fail to see how their rights would be affected by the entry of an order such as petitioners requested. Those bondholders may now have the right to look to the solvent users of the Terminal Company's facilities for the payment of the principal of and interest on the Terminal Company's bonds held by them, but the granting of the relief requested by petitioners would not affect this right.

As we pointed out in our original brief (pp. 55, 56), the bondholders are interested in receiving their money from the Terminal Company which issued the bonds. Under the operating agreement, any amounts which should be but are not paid by a using company must be made up by the remaining companies, so that at the present time a bondholder has no way of knowing what proprietary lines will contribute the money he receives from the Terminal Company, nor in what proportions the proprietary lines will make their contributions. Thus, so far as the bondholder is concerned, the situation under such an order as petitioners suggest would be the same as the situation which now obtains.

If such an order were made and every proprietary line of the Terminal Company except petitioners thereafter defaulted its obligations under the operating agreement, petitioners would be required to pay all obligations of the Terminal Company so long as they were able, either on a user, numerical or some other basis. These considerations make it plain that petitioners have requested nothing which will injure any holder of the securities of the Terminal Company, and this being so, it is unnecessary to give consideration to the question of what the legal rights of such security holders might be if something else were proposed to be done.

Other contentions of respondents.

It is faintly suggested in the brief of the Terminal Company (pp. 88, 89) that the case is moot and also that it should be disposed of on the ground of petitioners' laches. These matters are dealt with in our main brief. (pp. 56, *et seq.*, 61, *et seq.*) The Terminal Company does not urge these points with any insistence, and we submit that the argument heretofore presented in our main brief with respect to them fully answers the suggestions made.

It is further suggested by the Terminal Company (p. 87, its brief) that the intervening petitions filed with the Commission by petitioners unduly broadened the issues in violation of the Commission's rules, and that the Commission should have dismissed them for that reason. On this point it is sufficient to say that no matter what the Commission might or should have done, it did not dismiss these petitions because they were in violation of any of its rules. On the contrary, it received the petitions and a motion to dismiss them, reserved the motion to dismiss until the hearing on the merits, and thereafter dismissed the petitions, not because they broadened the issues, but on a holding that the Commission had not the power and authority to grant the relief requested or that relief which the Commission thought was requested. The failure of the Commission to dismiss the petitions on the ground that they unduly broadened the issues concludes the Terminal Company, and it may not now be heard to complain of the Commission's action in this respect.

All briefs for the respondents also present a substantial volume of argument said to show that the unlawful prejudice and discrimination alleged by petitioners does not in fact exist. In our brief (pp. 44, *et seq.*) we make some reference to the facts, but only for the purpose of giving point to our argument in support of the power of the Com-

mission to grant the relief requested by petitioners. We assume that the ascertainment of facts to prove or disprove the unlawful prejudice and discrimination alleged by petitioners will be left to the Commission, and that it is, therefore, unnecessary to argue those facts to this court.

We only wish to direct attention to the fact that in deciding on the petition of the Missouri-Kansas-Texas Railroad (198 I. C. C. 4), the Commission was required, under Section 3 (4) of the Act, to fix the amount to be paid by that railroad "on the principle controlling compensation in condemnation cases." Its conclusion that the user basis could not be used was reached because of this statutory requirement. Moreover, petitioners have never insisted upon the user method of distributing the tax and interest charges of the Terminal Company as being the only method of curing the discrimination and prejudice alleged to exist. The determination of what is necessary to produce that result will, we assume, be left to the Commission should this Court conclude that the writ prayed for should issue.

As a final answer to the relief which petitioners have requested, the Terminal Company, in concluding its brief (pp. 98, *et seq.*) urges that a decision supporting the claims of petitioners with respect to the Commission's jurisdiction will produce a "swarm" of similar controversies; that contract and property rights and agreements will be disrupted with "a complete destruction of all confidence in the written word." This argument has been made many times. A complete answer to it was made by this Court in *United States, ex rel.* v. *Delaware & Hudson Company*, 213 U. S. 366, which case involved the constitutionality and meaning of the so-called commodities clause. Dealing with a similar argument there made, this Court said, at page 405:

> "We at once summarily dismiss all the elaborate suggestions made in argument as to the alleged wrong to result from the enforcement of the clause, if it be

susceptible of the construction which the government has placed upon it. We do this because, obviously, mere suggestions of inconvenience or harm are wholly irrelevant, as they cannot be allowed to influence us in determining the question of the constitutional power of Congress to enact the clause."

Obviously, the determination of the issues presented herein cannot be made to depend upon the considerations suggested by counsel, nor upon the further assertion that if petitioners are unsuccessful, all pending litigation arising out of the operating agreement will be terminated.

Conclusion.

The operating agreement relating to the use of the properties of the Terminal Company by petitioners and the other proprietary lines of the Terminal Company has approximately one hundred and seventy-five years to run. It is plain that the burdens imposed upon petitioners under this agreement are extremely serious. While respondents have indicated some doubt as to the correctness of the figures contained in Petitioners' Exhibit 2, attached to the petition in the Supreme Court of the District (R. 60), the report of the Commission itself (R. 88) affirmatively shows the extent of the burden under which petitioners have been and are now laboring. This burden will continue for the full term of that agreement, unless the Commission has the power which we contend it has.

In the last analysis, respondents' contentions on the question of the Commission's jurisdiction reduce to the claim that the operating agreement itself is of such sanctity that no matter what law violations and other improprieties may result from its operation, petitioners can secure no relief from any source. We submit that this cannot be so, under the law as consistently construed and applied by this court.

The judgment of the Court of Appeals should be reversed with directions that the writ of mandamus prayed for be issued.

Respectfully submitted,

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